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No. 00-1867

IN THE SUPREME COURT OF THE UNITED STATES

JAMES MING HONG, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER JAMES MING HONG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents an important, unresolved legal issue that warrants review by this Court, concerning the legal standards for imposing criminal liability under the responsible corporate officer doctrine upon persons who are associated with a company that illegally releases pollutants, but who do not themselves participate in or direct the unlawful discharges.

In its Opposition, the government repeats the failure of the lower courts to define and apply the elements of the offense. It relies on various findings of fact untethered to any legal standard or to the criteria that this Court previously has defined in permitting imposition of liability upon a responsible corporate officer.

ARGUMENT

1. Petitioner James Ming Hong was charged with liability as a "responsible corporate officer," a narrow pathway to liability established by the Clean Water Act that diminishes the quantum of proof that the government must show in order to obtain a criminal conviction. As demonstrated in the Petition, there are two essential elements of this statutory pathway: proof that the defendant (1) was a *de jure* officer of the offending entity; and (2) had a "responsible share" in the violation. The government conceded at trial that Mr. Hong was never designated a *de jure* officer of the corporation (C.A. App. 968-69, 1334) and stipulated that he had not participated in or directed the illegal discharges at issue in Counts Two through Thirteen (C.A. App. 1327-28).[1]

The government nevertheless attempted to take advantage of the diminished quantum of evidence required under the responsible corporate officer doctrine. It tried the case on the theory that Mr. Hong exercised *de facto* control over the corporation, even though he was not a *de jure* officer. The government also attempted to satisfy the responsible share requirement by showing general awareness by Mr. Hong of various facts concerning the pollution control system. The government did not show that the system was inappropriate from the outset, as it could not in the face of the two permits issued for the facility based on those controls (Opp. 3; C.A. App. 1327-28); or that Mr. Hong had ever learned during operations that illegal discharges had occurred or might occur unless prompt corrective actions were taken (C.A. App. 288, 374-75, 383-84, 500, 506-07, 1455).

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[1] The government's articulation of the Question Presented, which asserts that Mr. Hong was "personally involved in the actions that caused the violations," thus misstates the record.

To avoid the problem of a fatal variance between the theory on which Mr. Hong was charged and the proof actually adduced by the government,[2] the courts below devised and applied three different, *ad hoc* legal standards for the responsible corporate officer doctrine. Pet. App. 7a, 22a, 37a. None of these standards is consistent with the literal language or the Clean Water Act or with this Court's prior articulation of the circumstances when, consistently with the Due Process Clause, a defendant may be held liable as a responsible corporate officer based on a negligent breach of a legal duty of care.

The Opposition relies on the same standardless approach as the decisions below. It suggests that further review is not warranted because there were ample factual findings to support the conviction, with particular emphasis on the findings by the Magistrate Judge. The government places particular reliance on assertions by the Magistrate at sentencing, rather than at the liability determination stage. Opp. 12-13. The flaw in the government's approach is that the factual findings cannot be divorced from the legal standard that was being applied, and thus fail to provide a proper basis for the convictions.

As demonstrated in the Petition, each of the three courts that reviewed the matter applied a different articulation of the essential elements of the offense. No reviewing court followed the legal standard that had been applied by the court whose decision was under review. *See* Pet. 7-11, *quoting* Pet. App. 7a, 22a, 37a. For example, the Magistrate Judge convicted Mr. Hong under an ownership and *de facto* control theory. *See* Opp. 6, quoting Pet. App. 37a ("[Mr. Hong] took an actual active participation in the operations of these entities. And to that extent, I find that

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[2] *See United States v. Stirone*, 361 U.S. 212 (1960).

he's liable under the law."). Neither the district judge nor the court of appeals adopted his approach, but rather devised their own unique and unprecedented formulations of the responsible corporate officer doctrine.

The disparities in the elements of the offense formulated by the courts below underline the validity of the concerns expressed by the dissenting Justices in *Hanousek* about the improper expansion of criminal liability under the environmental laws. *United States v. Hanousek*, 176 F.3d 1116, *cert. denied*, 528 U.S. 1102, 1103 (2000) (Thomas & O'Connor, JJ., dissenting).

If the governing standard is, as the Magistrate Judge held, whether the defendant "took an actual active participation in the operation" of the offending corporation, the combination of the misdemeanor provision and the responsible corporate officer doctrine will operate in practice as a *de facto* strict liability statute. This standard is far broader than, and inconsistent with, the nexus requirement recognized by the Court in *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943).

In sum, the recurrent question about the appropriate scope of the responsible corporate officer doctrine in environmental criminal prosecutions warrants review by this Court.

2. The legal standards applied by the Fourth Circuit depart from those followed by this Court and other courts of appeals on both the "officer" element and the "responsible share" element of the offense.

With respect to the "officer" element, the government does not address the consequences of the codification of the

term "responsible corporate officer" in the Clean Water Act or the canons of construction that require that the statutory term "officer" be given its commonly understood meaning. *E.g.*, *Burks v. Lasker*, 441 U.S. 471, 478 (1979). Nor does the government dispute the showing in the Petition that the defendants convicted under the responsible corporate office doctrine in *Park*, *Dotterweich*, and Circuit court decisions applying 33 U.S.C. § 1319(c)(6) were in fact *de jure* officers of the offending entity.

The Fourth Circuit's holding – that "the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA" – on which the government relies (Opp. 10, quoting Pet. App. 7a-8a), is inherently circular and reads the "officer" requirement out of the statute. The test employed below threatens a substantial expansion of criminal liability for persons associated with corporations, especially those who may exert some degree of financial influence over small closely-held companies, by extending the diminished quantum of proof required under this liability pathway to a broader class of persons than those designated by Congress.

The inter-relationship between the responsible corporate officer doctrine and the evidentiary showing required for conviction also demonstrates the error in the government's policy argument that application of the statutory "officer" requirement would "reward and encourage" illegal pollution. Opp. 10. Adherence to the "officer" standard would not immunize from liability for unlawful discharges persons who are not *de jure* officers but who allegedly exercise control over corporate activities. Its only effect would be to preclude prosecutors from relying on the diminished quantum of proof required for conviction under the responsible corporate officer pathway. The

government would instead be obliged to make the showing required under the "person" pathway to liability, namely that the defendant negligently participated in or ordered the illegal acts.

Finally, the government argues that because Mr. Hong, in one document (whose authenticity was disputed), held himself out to be an officer of the company, he may properly be held liable as a responsible corporate officer. Opp. 12. As applied to date by this Court and the courts of appeals, however, the responsible corporate officer doctrine has not been construed to extend to "holding out" to a third party, but has applied only to *de jure* officers. Thus, rather than stating a factual question to which deference is due, the government's argument highlights the legal question presented in the Petition. It further demonstrates that the contours of the responsible corporate officer pathway to liability are so uncertain as to justify review by this Court.

3. With respect to the "responsible share" element, the government does not challenge the articulation of that standard set forth in the Petition. Rather, it contends that the evidence at trial and the Magistrate Judge's findings show that Mr. Hong had sufficient awareness of possible violations of the Clean Water Act to sustain the convictions. Opp. 13 (n.2). For example, the government asserts that "by mid-April it was common knowledge at Avion that the [pollution control] system did not work." Opp. 4. The government does not try to show, however, that this "knowledge" was ever communicated to Mr. Hong. The government also ignores undisputed evidence that general manager Robert Kirk subsequently headed off a letter from the vendor of the system that would have conveyed that information to Mr. Hong (C.A. App. 374-75; 383-84, 1455), and that the Richmond Publicly Owned Treatment Works (POTW) failed to notify Mr. Hong that Kirk had been caught illegally

discharging (C.A. App. 288, 500, 506-07). The government also does not challenge the assertion in the Petition that there was no evidence at trial that any person actually informed Mr. Hong of a failure or a possible failure of the pollution control system, and that the prosecution specifically failed to elicit such testimony from Kirk, the general manager in charge of operating the system. Pet. 6-7.

The Magistrate Judge's actual conclusion at the liability stage of the trial was that Mr. Hong could be found guilty because he had participated in the original negotiations for the purchase of the pollution control system:

> My problem comes with finding [Mr. Hong] guilty of each separate instance, because in each separate instance, I have to find guilt beyond a reasonable doubt. And, I say this, [Defense Counsel], because I assume you are going to appeal it, so you know exactly where I'm coming from. I am interpreting the statute to mean that once the owner puts the machinery into place and then negligently permits the operation of the company to discharge the effluence into the sewer system in violation of the permit, he's responsible for each separate discharge while he's in charge of the company, whether or not he's present on the premises. C.A. App. 991.

In making this finding, the Magistrate Judge was applying a theory of liability under which a person, not a *de jure* officer of the company, could be held liable under Section 1319(c)(6) as a responsible corporate officer if that individual had an ownership interest and took an active role in any aspect of corporate operations. Pet. App. 37a.

As noted, neither the district court nor the court of appeals adopted the Magistrate's interpretation of the requirements of the Clean Water Act. Further, the

Magistrate's standard does not comply with this Court's articulation of the responsible corporate officer pathway to liability, which requires proof either that a corporate officer failed to arrange for installation of adequate compliance systems in the first instance or that, after installation of adequate systems, he obtained actual awareness that the controls had failed or were in danger of failing, but neglected to institute investigations and corrective actions. *Park*, 421 U.S. at 672.

Here, the evidence shows that the pollution control system that Mr. Hong helped purchase for the facility worked at the outset. The plant was permitted twice by Richmond's POTW based on this technology. Opp. 3; C.A. App. 1327-28. The plant also operated in conformance with its permit, using this technology, after Kirk was terminated. C.A. App. 795.

The evidence of events that occurred during operations failed to show that Mr. Hong had been alerted that the pollution control system was in danger of failing. The evidence showed that Kirk actively suppressed communication of information to Mr. Hong by the vendor of the technology that would have informed him of imminent failure. C.A. App. 374-75, 383-84, 1455. Further, Mr. Hong never was informed that the City of Richmond had detected Kirk in the process of making an illegal discharge. C.A. App. 288, 500, 506-07. The only evidence the government introduced of a communication in which Mr. Hong was informed of failure of the pollution control period occurred after the period charged in the Information. C.A. App. 790. Kirk was terminated shortly after this event. C.A. App. 798.

In sum, there is no basis for the government's assertion that the Magistrate Judge's factual findings make the legal issues involved in this case irrelevant. Opp. 13. To the contrary, there is an important and unresolved legal issue

presented about the proper application of the responsible corporate officer doctrine in environmental prosecutions. Resolution of this recurrent legal question is important for the administration not only of the Clean Water Act but also other environmental statutes that include the same statutory provision.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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